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No. 316
IN THE

# Supreme Court of the United States

REUBEN CAPELOUTO,
Appellant,

vs.

ORKIN EXTERMINATING COMPANY OF FLORIDA, INC., a Florida corporation,
Appellee.

## JURISDICTIONAL STATEMENT

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IN THE

# Supreme Court of the United States

REUBEN CAPELOUTO,
Appellant,

vs.

ORKIN EXTERMINATING COMPANY OF FLORIDA, INC., a Florida corporation,
Appellee.

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## JURISDICTIONAL STATEMENT

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### I. Opinion Below:

The opinion from which this appeal is taken bears number 34,307 in the Supreme Court of Florida and is reported as **Capelouto v. Orkin Exterminating Company of Florida, Inc.**, 183 So. 2d 532.

There is appended hereto a copy of the decision appealed from (App. 1); a copy of the denial of petition for rehearing thereof (App. 9); and a copy

of the final decree of the Circuit Court of Leon County, Florida, which was affirmed by the decision herein appealed (App. 10).

**II. Jurisdiction:**

(1) Nature of the Proceeding:

On May 4, 1964, appellant, Reuben Capelouto, filed complaint in the Circuit Court for Leon County seeking a declaration of his rights under an employment contract as a former employee of the appellee, Orkin Exterminating Company of Florida, Inc.

On June 1, 1964, Orkin filed its answer to the complaint together with a counterclaim seeking injunctive relief and damages.

Final hearing was held on August 5, 1964; the trial court, sitting in equity, entered a final decree on January 11, 1965, finding that the contract was valid and enjoining the appellant for two years from February 15, 1965 (nine and one-half months after the termination of the subject contract), from competing with the appellee, his former employer. In that final decree the trial court specifically ruled that Section 542.12(2), Florida Statutes, was constitutional.

On January 27, 1965, Capelouto appealed to the Supreme Court of Florida, which affirmed the decree of the lower court; that affirmance became final on March 14, 1966.

The suit below was an adversary proceeding throughout and is a case or controversy within the purview of Section 1 of Article III of the United States Constitution.

(2) Dates and Court:

(a) The decision appealed from was entered January 5, 1966;

(b) The order denying rehearing was entered March 14, 1966;

(c) The notice of appeal was filed on May 3, 1966 in the Supreme Court of Florida.

(3) 28 U.S.C. 1257(2) is believed to confer jurisdiction hereof upon this Court; the appellant has consistently contended that the said state statute, Section 542.12(2), on its face and as applied, violated the United States Constitution. The validity of the statute was upheld in the decision from which this appeal is taken.

(4) Cases believed to sustain the jurisdiction:

**Bantam Books, Inc.** v. **Sullivan,** 372 U.S. 58, 9 L. ed. 2d 584;
**Cramp** v. **Board of Public Instruction of Orange County, Florida,** 368 U.S. 278, 7 L. ed. 2d 285;
**Robinson** v. **Florida,** 378 U.S. 153, 12 L. ed. 2d 771;

**Indiana ex rel. Anderson v. Brand,** 303 U.S. 95, 82 L. ed. 685;
**Kedroff v. Saint Nicholas Cathedral,** 344 U.S. 94, 97 L. ed. 120;
**Stoll v. Gottlieb,** 305 U.S. 165.

(5) State statute involved:

Section 542.12, Florida Statutes, 1963:

"(1) Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by subsection (2) and (3) hereof, is to that extent void.

"(2) One who sells the good will of a business, or any shareholder of a corporation selling or otherwise disposing of all of his shares in said corporation, may agree with the buyer, and one who is employed as an agent or employee may agree with his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a reasonably limited time and area, so long as the buyer or any person deriving title to the good will from him, and so long as such employer continues to carry on a like business therein. Said agreements may, in the discretion of a court of competent jurisdiction be enforced by injunction.

"(3) Partners may, upon or in anticipation of a dissolution of the partnership, agree that all or some of them will not carry on a similar business within a reasonably limited time and area.

"(4) This section does not apply to any litigation which may be pending, or to any cause of action which may have accrued, prior to May 27, 1953."

III. **Questions Presented by the Appeal:**

(1) DOES SECTION 542.12(2), FLORIDA STATUTES, IN ITS APPLICATION TO APPELLANT, DEPRIVE HIM OF RIGHTS GUARANTEED UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

(2) WHEN AN EMPLOYEE AGREES, DURING THE TERM OF HIS EMPLOYMENT, WITH HIS EMPLOYER NOT TO COMPETE FOR TWO YEARS AFTER THE TERMINATION OF SUCH EMPLOYMENT, DOES THE ACTION OF A STATE COURT IN ENJOINING THE EMPLOYEE FROM COMPETING WITH HIS EMPLOYER FOR A TIME BEYOND THE TWO-YEAR PERIOD DEPRIVE THE EMPLOYEE OF RIGHTS GUARANTEED HIM UNDER THE FOURTEENTH AMEND-

MENT TO THE UNITED STATE CONSTITUTION?

(3) WHEN AN EMPLOYEE AGREES, DURING THE TERM OF HIS EMPLOYMENT, WITH HIS EMPLOYER NOT TO COMPETE FOR TWO YEARS AFTER THE TERMINATION OF SUCH EMPLOYMENT, DOES THE ACTION OF A STATE COURT IN ENJOINING EMPLOYEE FROM COMPETING WITH HIS EMPLOYER FOR A TIME BEYOND THE TWO-YEAR PERIOD IMPAIR THE OBLIGATION OF A CONTRACT, CONTRARY TO ARTICLE III, SECTION 10, OF THE UNITED STATES CONSTITUTION?

**IV. Statement of the Case:**

Following his graduation from the University of Florida, with a Master of Science degree in entomology, appellant was employed by Orkin Exterminating Company.

There were three contracts signed by appellant during the period of his employment, the first being dated August 1949; the second being dated February 1950; and the third, which is the one involved in this litigation, dated in September, 1953. Each of these contracts is similar except the last which makes reference to Section 542.12, Florida Statutes. Each of these contracts provide that upon the termination of

appellant's employment he will not compete with Orkin for a period of two years within the territory specified in the contracts. The first contract covered a territory in the vicinity of Daytona Beach, and the other two contracts covered an area roughly equivalent to fifteen or sixteen counties in the panhandle area of Florida.

Appellant, after having suffered much criticism from his immediate supervisor in the Orkin chain of command, tendered his resignation on April 15, 1964, effective May 1, 1964.

Immediately after May 1, 1964, appellant instituted suit in the Circuit Court of Leon County, Florida, for a declaratory judgment as to his rights and status under the last of the three-described contracts, and seeking relief from the provisions limiting his right to enter into competition with Orkin in the structural pest control business.

Appellant has not followed any other livelihood since his graduation from college; he is married and has children; he is a certified structural pest control operator (in fact, he was, at the time of the final hearing in the trial court, a member of the Structural Pest Control Commission of the State of Florida, which issues certificates to structural pest control operators); he has lived all of his life in Tallahassee, except the first two years; he is now 46 years of age; and he will be unable to follow his calling anywhere within a radius of approximately one hundred miles from his

home in Tallahassee if the Florida court's decision is allowed to stand.

The federal question was squarely presented to and considered and rejected by the trial court (App. 19) and the Florida Supreme Court (App. 4-5). Under the Florida Constitution and the Florida Appellate Rules, the Florida Supreme Court has jurisdiction on appeal only where a constitutional question is presented (and on certain other grounds not involved in this case). The Florida Supreme Court accepted jurisidicition (App. 3); and in considering the constitutionality of the statute concerned, upheld its validity.

It pointed out (App. 2):

> "Before the chancellor, appellant argued, alternatively, (1) that the contract was void under Section 542.12, F.S., because not reasonable as to the area covered, as required by subparagraph (2) of that section; and (2) under the statute, the statute itself was invalid as depriving him of the equal protection of the law and of his property right to earn a living."

and (App. 3):

> "Appellant raises four questions for our consideration: (1) whether Sec. 542.12(2) is valid under Florida and federal constitutions; (2) whether the subject covenant not to compete is invalid under the statute as covering too large a geographical area; (3) whether the chancellor abused his dis-

cretion in imposing a two year injunction period running some nine months beyond the date contemplated by the contract itself; and (4) whether there are any special equities in favor of the appellant that require a holding that the contract was void as unreasonable."

The Florida court specifically held the statute "as applied to such contracts between an employee and an employer to be constitutional" (App. 5).

Where the state court does not decide against an appellant upon an independent state ground, but deeming the Federal question to be before it, actually entertains and decides that question adversely to the Federal right asserted, the United States Supreme Court has jurisdiction to review the judgment if it is a final judgment. **Indiana ex rel. Anderson v. Brand**, 303 U.S. 95, 82 L. ed. 685.

Not only was the Federal question presented for determination, but its decision was necessary to a determination of the case; and the Federal question was actually decided.

The foregoing shows that the nature of the case and the rulings of the courts, both trial and appellate, were such as to bring this appeal within the purview of 28 U.S.C. 1257(2) and to vest jurisdiction in this Court according to the cases cited herein.

These facts and reasons, however, go only to Questions (1) and (2) set out on page 5 hereof. Question (3) raises the issue of whether the trial court's extending of the life of the covenant not to compete by enjoining the appellant from competing with the appellee for two years from February 15, 1965, impairs the obligation of a contract. This point was not specifically raised below, but must be considered in conjunction with Questions (1) and (2). The contract provided for no competition for two years after termination of employment. Should the statute, both on its face and in its application to appellant, be deemed valid under the Fourteenth Amendment, then the contract is valid and enforceable against appellant. The contract is specific, however, in limiting the restrictive covenant to a two-year period; there is implied, then, an agreement between the parties that competition thereafter can exist between them and would be lawful and unobjectionable. Such a contract as is here involved is an exception to public policy and must be strictly construed. The court by its injuction is in itself violating public policy; it is creating a restraint of trade by judicial fiat.

Neither the law nor any contract prohibits appellant from engaging in his occupation in Tallahassee or elsewhere after May 1, 1966. The action of the court is arbitrary and unreasonable and deprives appellant

of his right to follow a lawful calling wherever he desires. The decision itself is a deprivation of appellant's right to life, liberty and the pursuit of happiness.

WILFRED C. VARN
of the law firm of
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Post Office Box 1567
Tallahassee, Florida

Attorneys for Appellant

I HEREBY CERTIFY that a copy hereof has been furnished by delivery to Honorable J. Lewis Hall, of Hall, Hartwell, Hall & Canada, counsel of record for appellee, at the office of said counsel, Midyette-Moor Building, Tallahassee, Florida, this day of June, 1966.

Attorney for Appellant
and a member of the bar of the
Supreme Court of the United States

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# APPENDIX

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IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1965

REUBEN CAPELOUTO, **

Appellant, **

vs. ** CASE NO. 34,037

ORKIN EXTERMINATING COMPANY OF FLORIDA, INC., a Florida Corporation, **

Appellee. **

**

Opinion filed January 5, 1966

An Appeal from the Circuit Court for Leon County, Ben C. Willis, Judge

Wilfred C. Varn of Ervin, Pennington, Varn and Jacobs, for Appellant

J. Lewis Hall of Hall, Hartwell and Hall, for Appellee

O'CONNELL, J.

Appellant, Capelouto, was formerly employed as a branch manager by Orkin, the appellee extermi-

nating company. The contract of employment provided that upon termination of appellant's employment he would not compete with Orkin for a period of two years within the area managed by him. Appellant terminated his employment with Orkin effective May 1, 1964, apparently as a result of a personality conflict with a superior in that organization. Almost immediately thereafter he commenced his own exterminating business within the prohibited area and instituted this suit. In the trial court appellant sought a declaratory judgment concerning his rights and status under the above employment contract and asked to be relieved from the provisions of the contract limiting his right to enter into competition with Orkin in the structural pest control business.

Before the chancellor, appellant argued, alternatively, (1) that the contract was void under Sec. 542.12 F.S. because not reasonable as to the area covered, as required by subparagraph (2) of that section; and (2) that if the contract were held valid under the statute, the statute itself was invalid as depriving him of the equal protection of the law and of his property right to earn a living.

The chancellor rejected both arguments and enjoined appellant from competing with appellee for a period of two years beginning February 15, 1965, which date was about 30 days after entry of the final decree and some nine months after the filing of the suit. On petition for rehearing the decree was amended to

make the injunction begin to run on March 1, 1965. Concerning the constitutionality of the statute, the chancellor concluded:

> "In view of the numerous applications of the statute and the apparent recognition in at least one case that Standard Newspapers, Inc., supra, has settled the constitutionality of the statute and perceiving no reason to distinguish that case from this in constitutional application, it is concluded that subsection (2) of F.S. 542.12 is constitutional."

The chancellor having passed directly upon the validity of the statute, the case is properly before us for review by appeal.

Appellant raises four questions for our consideration: (1) whether Sec. 542.12(2) is valid under Florida and federal constitutions; (2) whether the subject covenant not to compete is invalid under the statute as covering too large a geographical area; (3) whether the chancellor abused his discretion in imposing a two year injunctive period running some nine months beyond the date contemplated by the contract itself; and (4) whether there are any special equities in favor of the appellant that require a holding that the contract was void as unreasonable. We shall discuss these points in the order listed.

In **Standard Newspapers v. Woods**, Fla. 1959, 110 So. 2d 397, this court affirmed the decree of the chancellor insofar as it held the subject statute to be valid, saying at p. 400:

> "We come, then, to the conclusion that the chancellor ruled correctly when he held the act constitutional. As for the appellee, as appellant concedes, he is not prohibited as an employee from securing a livelihood for his family but is only precluded from entering the field as a proprietor."

As the reported facts and the above quoted portion of that case reveal it did not involve a contract restraining an employee from competing with his former employer as does the case at bar. Therefore, as the chancellor recognized in the decree under review, the **Standard Newspapers** case did not specifically settle the constitutionality of subsection (2), Section 542.12, as applied to contracts affecting employees or agents. We will consider the question now.

As was pointed out in our opinion in **Standard Newspapers**, supra, under the common law, contracts restricting a man's right to follow his calling were considered void. But the reasons which supported the common law view have long since disappeared. In any event, there can be no doubt that the legislature of our state has the power to enact legislation superseding the common law as it did by enactment of Section 542.12, and more specifically by the enactment of subsections (2) and (3) thereof.

Appellant argues that the statute is invalid as denying him equal protection and due process of law, but he offers no convincing authority in support.

There has been no showing of invalidity sufficient to overcome the presumption of validity which we must indulge in favor of every properly enacted statute. **Kass v. Lewin,** Fla. 1958, 104 So. 2d 572. We therefore hold subsection (2) of Section 542.12, as applied to such contracts between an employee and an employer to be constitutional.

We agree with appellant that the fact that such contracts may be lawfully made and enforced under the statute does not ipso facto make every such contract enforcible as written. The restrictive provisions of such contracts will generally be enforced in such way as to protect the legitimate interests of the employer without doing harm to the public interest, and without inflicting an unduly harsh or oppressive result on the employee.

Absent any overriding public interest in having the restricted employee's services available to it, and we find none present here, the guidelines to be followed in enforcing any such contract are reasonableness as to time and as to area.

In the instant case the contract prohibited the appellant-employee from competing with the appellee-employer in the area in which the employee was engaged in managing the employer's business and servicing its customers. The area encompasses 15 or 16 North and Northwest Florida Counties. The chancellor found the area not to be unreasonable and we agree.

The restrictive time, two years from termination of appellant's employment, was also found to be reasonable by the chancellor. We see no ground upon which this ruling should be disturbed.

Appellant also contends that the chancellor abused his discretion in enjoining appellant from competing with appellee for a period of two years from March 1, 1965, rather than two years from the date he terminated his employment, as provided in the agreement. The chancellor did not explain why he ordered the injunctive period to commence on March 1, 1965, rather than on the date of his decree, January 11, 1965, or on the effective date of appellant's resignation from the employment, May 1, 1964.

Nevertheless, the chancellor's reasoning is apparent. He intended to give the appellant approximately a month to arrange his affairs before the injunction would become effective. More important, he must have determined that under the contract the appellee-employer was entitled to have a period of two years during which the appellant-employee would not be in competition with it and in contact with its customers in the area involved. Inasmuch as the appellant had been in competition with the appellee continuously since his resignation, the chancellor must have determined that this was the only way to give the appellee its two competition-free years. We can find no fault with this theory or with the result of its application.

Appellant argues that he acted swiftly to obtain an adjudication of his rights under the contract and he should not be penalized by extending the restrictive period beyond the time specified in the contract. This argument ignores the fact that appellant has participated in the prohibited activities during the course of the litigation. To agree with appellant would be to nullify, in major part, the effectiveness of such agreements. This is particularly true since in most cases of this kind, as the chancellor found in this one, money damages are not susceptible of proof with the required degree of certainty and therefore cannot be awarded. This is the apparent basis for the provision in the statute of injunctive relief. We think that the procedure followed by the chancellor is the only way by which the provisions of the contract and the statute could be effectuated.

Appellant's last contention is that there are special equities which should operate in his favor. We find none that would not be present in almost every case of this nature.

The decree appealed from is
AFFIRMED.

THORNAL, C.J., and DREW, J., and TROWBRIDGE, Circuit Judge, concur
CALDWELL, J., dissents in part
THOMAS and ROBERTS, JJ., dissent and agree with CALDWELL, J.

CALDWELL, J., dissenting in part:

I must dissent in part. The contract between the parties provided the employee, Capelouto, would not, within two years after termination of his employment, engage in competition with Orkin. Capelouto terminated his employment on May 1, 1964, and it is my view the injunction should have been made effective for a period ending two years thereafter. The majority opinion holds that, because it would have been difficult to assess damages for the breach, it is only fair to enjoin for two years from February 15, 1965, the date of the Chancellor's decree, rather than as agreed upon in writing by the parties. But, under our system of jurisprudence, it is not our function to trim and pad our conclusions to fit the curves and dimples of fairness nor to otherwise temper the rigors of express agreements. Stare decisis is preferable to the Napoleonic idea of meting fairness in accordance with the passing whim of each judge in each case.

In all other respects I concur.

THOMAS and ROBERTS, JJ., concur

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A.D. 1966
MONDAY, MARCH 14, A.D. 1966

REUBEN CAPELOUTO, **

Appellant **

vs ** CASE NO. 34,037

ORKIN EXTERMINATING ** COMPANY OF FLORIDA, INC., a Florida corporation, ** Appellee

**

On consideration of the Petition for Rehearing filed by Attorney for Appellant,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,
TEST:

SID J. WHITE
CLERK SUPREME COURT

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA. IN CHANCERY. NO. 19551

REUBEN CAPELOUTO, :

Plaintiff, :

vs. :

ORKIN EXTERMINATING COMPANY OF FLORIDA, INC., a Florida corporation, :

Defendant. :

## FINAL DECREE

This cause came on for final hearing before the Court on the pleadings and the evidence produced by the respective parties, and the Court having considered same and having heard argument and read briefs of counsel for the respective parties and being otherwise advised of its opinion in the premises, it is thereupon,

ORDERED, ADJUDGED and DECREED as follows:

(1) This is a suit for a declaratory decree pursuant to Chapter 87, Florida Statutes, on behalf of the

plaintiff and a counterclaim by defendant for monetary damages and injunctive relief. The Court has jurisdiction of the subject matter and of the parties to the cause;

(2) (a) The facts in this case are not in substantial conflict though the parties urge different inferences to be drawn from such facts. The plaintiff Capelouto is forty-four years of age, married and has three children, all ten years of age or younger. He graduated from the University of Florida in 1949 with a master's degree in entomology. He also has a bachelor of science degree in agriculture. He has had special training in structural pest control. Since August 1, 1949 he had been employed by the defendant corporation until he resigned effective May 1, 1964. His employment has been the subject of three written contracts with the defendant, the last of which is dated September 1, 1953. This contract recites the employment of plaintiff by defendant as manager of the Tallahassee, Florida office and specified compensation at the rate of two hundred dollars per month plus a five per cent commission from cash received and deposited through the Tallahassee office from pest control contracts and termite control contracts serviced by that office. Also a part of the contract are paragraphs 6 and 7 which in substance contain an agreement on the part of plaintiff to refrain for a period extending to two years immediately following the termination of his employment from engaging in any pest control activity which would be competitive

to the defendant in an area specified as certain named cities or towns and a twenty-five mile radius of each. This would be roughly equivalent to 15 or 16 counties in the Big Bend area of North Central Florida. Each of the two previous written contracts had similar terms but had somewhat different provisions for compensation. Both of them had the same type of non-competitive agreement but the first specified a different area and constituted the plaintiff the manager of the Daytona Beach office.

(b) The defendant operates a well known and highly advertised "brand name" pest exterminating service. For administrative purposes its trade area is constituted into a district which is in turn divided into branches with supervisory and other personnel at both levels. Plaintiff was employed as the manager of the Tallahassee branch with its headquarters office in Tallahassee, from which was serviced an assigned area consisting of the same cities, and a twenty-five mile radius of each, specified in the above mentioned non-competitive clause of the contract. The "North Florida" district covers all of north Florida and the part of peninsular Florida from the vicinity of Orlando and Cocoa northward. The North Florida district supervisor during the time material to this controversy was Mr. Sam Walkup, who stood in the relationship to plaintiff as his immediate superior. Mr. Walkup was responsible to his superiors in the Orkin hierarchy for the proper operation of the various branches in his district. Walkup and Capelouto had been acquaint-

ances since they both were students at the University of Florida. The evidence indicates that during their initial acquaintance and for some time subsequently they were and regarded each other as good friends. Certain conflicts developed between them commencing in early 1963 which eventually culminated in the defendant submitting his resignation in April, 1964 effective May 1 of that year. This controversy will be more fully discussed hereinafter.

(c) At the commencement of plaintiff's employment by the defendant in August, 1949 he was given about a month's training at the home office* of the Orkin enterprise at Atlanta, Georgia. He subsequently went to Miami for two weeks for further training to observe the wrapping and sealing of houses for fumigation. He claims that he received no special training in managerial duties. About mid-September, 1949 he reported to the Daytona Beach office, where he worked a route making sales and performing the other duties involved in the operations from that office. However, he did not remain in Daytona Beach but a few months and on February 8, 1950 he was transferred to the Tallahassee office where he became manager (executing a new contract). The Tallahassee office had a larger volume of work than Daytona Beach and appears to have been a promotion. At least there was more area and a larger volume. From time to time during his employment he was sent to technical department training schools of short durations which were refreshers

* See next page

in the use of chemicals and safety measures. There were sent out on a regular basis circulars and manuals from the home office* dealing with techniques of pest control and similar material, which were labeled as confidential.

(d) Though plaintiff contends that none of this material or any other procedures of Orkin involve any secret information or technique, there is at least a clear necessity to Orkin that the materials used, their methods of application, the product appeal and customer relation practices (in short, the overall operation) be kept somewhat closely held in the bosom of the Orkin family.

(e) In early 1963, or about this time, relations between plaintiff and Walkup became strained. To discuss in extensive detail their conflicts would not be useful. It is sufficient to say that Walkup was consistently and extensively critical of plaintiff's operations and frequently wrote rather bluntly expressing his displeasure. Verbal discussions were in the same tenor. In some instances the criticism was quite severe and in a letter dated March 3, 1964 Walkup was blunt to the point of being quite rude. Mr. Walkup states that he deliberately undertook to "shock" the plaintiff

* Exhibits indicate that there is a parent organization named Orkin Exterminating Company, Inc., presumably a corporation, with a home office in Atlanta. The defendant corporation appears to be a "district" of the more inclusive Orkin enterprise.

hoping that this would bring about a correction of deficiencies. However, in the written communications there are many instances of praise and compliment to some phases of the work.

(f) Capelouto claims that the attitudes which Walkup expressed coupled with inferences or veiled threats of discharge caused him to feel very insecure and that it appeared that he could not please Mr. Walkup under any circumstances. He further contends that the letters and statements to him by Walkup were such that he could not continue to submit to them and retain his self-respect. Accordlingly, he determined to resign and thus terminate his employment.

(g) Almost immediately following the severance of his connection with the company he commenced a termite and pest control service of his own, inserting newspaper advertisements announcing same in which he offered services for control of termites, roaches and other pests. He has since continued to operate this business, admittedly in violation of the non-competitive agreements in his contracts with the defendant..

(h) For the past three months he has grossed about $2,250; 50 per cent of his accounts were formerly with Orkin, and a number of Orkin's customers have either cancelled or refused to renew their subscription to the service and have placed their business with the

plaintiff. The loss of these accounts which plaintiff acquired represents about $200 a month gross charges.

(3) Plaintiff contends that as applied to him the non-competitive agreements in this contract with defendant are void and unenforceable and he seeks a declaratory decree to that effect. He maintains that such agreements are unreasonable as to time and territory involved and therefore do not come within the sanction of Section 542.12(2), Florida Statutes, F. S. A. He also contends that if the mentioned statute does purport to authorize such agreements as are involved here, the statute is unconstitutional as depriving him of the equal protection of the laws and would deprive him of the property right to pursue a lawful business. On the other hand, defendant asserts that the agreements are fully authorized by the statute and the plaintiff should be enjoined from violation and made to respond in damages for breach.

(4) This cause brings squarely the construction, validity and application of Section 542.12 as it pertains to the facts presented here.

(5) At common law, contracts restricting a man's right to follow his calling were considered void as against public policy. Standard Newspapers, Inc. v. Woods, 110 So. 2d 397, 399. Prior to enactment of the mentioned statute, Florida courts were reluctant to uphold such contracts and refused to do so unless found by the court to be reasonable and fair. Love

et al. v. Miami Laundry Co., 118 Fla. 137, 160 So. 32. However, in 1953, there was enacted Chapter 28048, which now appears as Sec. 542.12, Florida Statutes. This statute restates the substance of the general common law rule by providing that "every contract by which any person is restrained from exercising a lawful profession, trade or business of any kind, otherwise than is provided by subsection (2) and (3) hereof is to that extent void." In subsection (2), in pertinent part thereof, is the following:

> "... one who is employed as an agent or employee may agree with his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a reasonably limited time and area, so long as ... such employer continues to carry on a like business therein".
> Also:
>
> "Said agreements may, in the discretion of a court of competent jurisdiction, be enforced by injunction."

Subsection (2) thus provides, inter alia, that the rule voiding contracts which restrain a person from pursuing a lawful occupation has an exception in the case of an agent or employee who agrees with his employer that:

(A) he will refrain from carrying on or engaging in a similar business; and/or

(B) he will refrain from soliciting old customers of such employer; Provided:

(1) The restraint is reasonable as to the area affected and as to the time within which it shall be observed; and

(2) The employer continues to carry on a like business therein.

The exception to the rule is to establish a public policy of approval of agreements which fall within its terms and to render them enforceable by the courts, even by injunctive orders in proper cases.

(6) As the plaintiff is obviously in violation of the non-competitive portions of his contract with defendant and is carrying on or engaging in a business similar to that of defendant, who continues to carry on a like business, he may escape from the consequences of his breach only in one of two ways:

(a) That subsection (2) of Section 542.12, Florida Statutes is unconstitutional, as applied to plaintiff; or

(b) That as applied to plaintiff, the pertinent portions of the contract restricting future pursuit of the business are not "within a reasonably limited time and area", or are "otherwise harsh, oppressive or unjust". (As to the last quoted portion, see headnote 4 of Atlas Travel Service v. Morelly, 98 So. 2d 816.)

(7) Constitutionality:

The plaintiff asserts that subsection (2) of F. S. 542.12 is unconstitutional as offending the equal protection clauses of state and national constitutions and also deprives him of his property, namely, the right to pursue a lawful business (State ex rel Fulton v. Ives, Fla. 167 So. 394). He cites no cases in support of this, and seeks to distinguish Standard Newspapers, Inc. v. Woods, 110 So. 2d 397 in which the subsection (1) of F. S. 542.12 was upheld. He claims that subsection (2) is arbitrary and unreasonable in its application to him. He also urges that as the subsection gives an exception to the general rule stated in subsection (1) it must be strictly construed. He then asserts that the statute refers to a contract of employment and poses the question of whether the restrictive covenant is enforceable after the contract is terminated. Apparently he would reason that only while the relationship of employer and employee continues to exist may the agreements against competition be enforced. Such a construction is obviously untenable. The contract embraces more than the duties and rights of the parties pertaining to the employee's services. It governs, in part, obligations which arise regardless of the actual status of employment. To adopt the view advanced would render all non-competitive contracts utterly useless. An employee impliedly owes his employer loyal service during the employment without express agreements to that effect. Thus, if the non-competitive agreements may

not survive termination of the employment status, they are mere redundant surplusage.

Moving then to a consideration of the constitutionality of subsection (2) in the light of the construction of its terms as authorizing a non-competitive contract to exend beyond termination of employment relationships, it is found that our appellate courts have not directly and expressly passed on this question.

In the Standard Newspapers, Inc. case, supra, the Supreme Court upheld the constitutionality of the portion of the statute condemning in general contracts restraining exercise of a lawful profession, trade or business. The chancellor had upheld the statute, but also held that the plaintiff, who had agreed not to compete and sought declaration of rights, was free to engage in the business he had agreed not to engage in. It apparently had been reasoned that the statute condemned such contracts and that plaintiff did not come within any of the exceptions set out in subsections (2) and (3). He had been a minority stockholder and an officer and director of a newspaper publishing corporation and had joined the corporation in the contract of sale of the business. The Supreme Court affirmed the chancellor's upholding of the statute, but reversed with directions to dismiss the complaint, holding that the plaintiff, under the circumstances, was involved in a sale of the good will of a business so as to come within one of the exceptions.

It appears implicit in the disposition of the case that the validity of the statute including at least the ex-

ception in subsection (2) pertaining to the sale of the good will of a business was upheld. Otherwise the court could not have rendered the judgment it did.

In the case before this court there is involved another exception to the general rule, namely an agent or employee agreeing to refrain from competing with his employer. Is the right of a former employee to pursue his occupation more precious and clothed with greater constitutional protection than for one who sells the good will of a business or all the stock in a corporation? No reason is advanced why it should be.

It also appears that the courts of this state have repeatedly recognized the constitutionality of this subsection as it pertains to agents and employees, without expressly so stating. In Tasty Box Lunch Company v. Kennedy, 121 So. 2d 52 and McQuown v. Lakeland Window Cleaning Co., 136 So. 2d 370, the courts enforced such contracts against employees. In McQuown it was flatly stated:

> "Standard Newspapers, Inc. v. Woods, Fla. 1959, 110 So. 2d 397, held the pertinent statute constitutional."

Recent cases involving contracts of the same nature and of great similarity to that in the case under consideration have recognized and enforced the contracts against former employees of pest control companies. Fogle v. Orkin Ext. Co. of S. Fla., 168 So. 2d 153; Orkin Ext. Co. of S. Fla. v. Lefkowitz (3d DCA) Case No. 64-805, opinion dated December 1, 1964. In these

cases the sole issue, which was held adverse to the employee in each case, was whether the statute is limited in its application to employees subsequently becoming proprietors of their own business or would also prevent employee from going to work for another. This issue is not involved in the case sub judice, but the cases mentioned did recognize the enforceability of the contracts.

In view of the numerous applications of the statute and the apparent recognition in at least one case that Standard Newspapers, Inc. supra, has settled the constitutionality of the statute and perceiving no reason to distinguish that case from this in constitutional application, it is concluded that subsection (2) of F. S. 542.12 is constitutional.

(8) **Reasonableness:**

As to time and area, the terms of the contract are not shown to be unreasonable. In Atlas Travel Service, Inc. v. Morelly, 98 So. 2d 816, a two year period applicable to the manager of a travel service agency was found to be reasonable. In some cases longer periods have been sustained. Rinker Materials Corp. v. Holloway Materials Corp., 167 So. 2d 875; West Shore Restaurant Corp. v. Turk, 101 So. 2d 123.

As to the area involved it is the same as that embraced within the territory assigned to the Tallahassee branch from which the plaintiff drew commissions when he was branch manager. It would be in such

an area that plaitiff's prior connection with defendant would be an advantage to him and a particular disadvantage to the defendant in event of competitive activity. When one's employer confers on him certain exclusive privileges from business of the employer produced from a specified area, ordinarily he cannot complain that the same area within which for a reasonable time he agrees not to compete is unreasonably large.

This leaves only the inferential question of whether or not, under the circumstances, the contract is "otherwise harsh, oppressive or unjust". The plaintiff very earnestly contends that it is. He points out that he is 44 years of age, married and has three children, has lived all of his life in Tallahassee except for the first two years of his entry into business, and will be unable to perform any other work except common labor in Leon County as he has not followed any other means of livelihood than pest control since his graduation from college. He further asserts that his pride and sensibilities had been so wounded by Mr. Walkup's constant pressure and criticism that he could not maintain his self respect and remain with the company.

When business, government or any other entity has a hierarchy whereby certain superiors have the right and power to exert authority over subordinates who are also in positions of significant responsibility, there is the not unusual result of clash of personalities. It is often galling to the subordinate who must either

submit or terminate the employment. However, that is one of the hazards and burdens of such an employment and unless the superior clearly abuses his authority, the subordinate has no legal basis because of such superior's actions to commit breaches of his obligation to the employer.

It is unfortunate that there did develop such an unhappy situation as between plaintiff and Walkup. On one occasion Walkup was unquestionably and unnecessarily rude. However, this was an exception rather than a consistent pattern. The general pattern was rather insistent pressure for improvement. This was interspersed with considerable criticism and admonition, but it also contained some praise, expressions of confidence, and encouragement. It can well be understood that plaintiff felt discouraged and uncomfortable when he was so often "on the carpet" with Walkup. However, it does appear that most of Walkup's criticism was directed to features which needed attention or correction. Regarding the entire situation this Court cannot find from the evidence that Walkup acted arbitrarily, capriciously or otherwise abused his authority. One in his position must have a considerable latitude in dealing with subordinates and though he has no license to degrade or insult, an isolated lapse in that regard will not suffice to justify an employee's breach of important contractual obligations to the employer. If plaintiff's feelings are hurt to the extent that he cannot longer endure continued employment, he is free to leave it, but in doing so he

remains bound to observe the non-competitive clauses of his contract. He cannot pursue his profession within the prescribed area for the time limited, but he is free to do so elsewhere. There is evidence that one trained and with the experience of the plaintiff would have many opportunities for employment in pursuit of this profession in almost any area of the country where structural pests are a problem. Therefore, it cannot be said that the restraints of his contract will relegate him to mere common labor opportunities. Perhaps in Tallahassee or elsewhere in the Tallahassee branch area his opportunities would be very limited, but movement to another area is an experience thousands of Americans have every year without crippling effects.

Non-competitive agreements such as are involved here are fully sanctioned by law and the courts are bound to recognize and enforce the rights of the parties under them. The courts do not make the contracts. The parties do. Presumably the compensation and other benefits to the employee under the contract are in part based upon the burdens of the non-competition clauses of the same contract.

The Court does not find that the challenged portions of the agreement are harsh, oppressive or unjust. They impose a hardship, but only one which had been fully, openly and freely agreed to.

(9) The defendant in its counterclaim has sought monetary damages as well as injunctive relief. It is shown that some prior customers of Orkin are now doing business with the plaintiff. Plaintiff denies that he solicited them. The awarding of monetary damages in an equity case such as this is discretionary with the chancellor. McQuown v. Lakeland Window Cleaning Co., supra, in which it was also held: "Damages ordinarily are not recoverable absent evidence of specific facts and circumstances from which damages may be ascertained with certainty". There is evidence that plaintiff's activity is inflicting some injury on defendant and will with reasonable certainty be even more damaging in the future. Injunctive relief is necessary to prevent the statute and the contract from being nullified. However, the amount and extent of actual monetary damage sustained by defendant is not ascertainable with any degree of certainty and an award of same is denied.

## DECLARATIONS

Accordingly, it is further ORDERED, ADJUDGED, DECREED and DECLARED:

1. The contract between the plaintiff and defendant dated September 1, 1953, a copy of which appears as Exhibit A to the Complaint, is a valid, enforceable contract, including the so-called non-competitive area clauses set forth in paragraphs 6 and 7 of said contract.

2. Subsection (2) of Section 542.12, Florida Statutes, in its application to the plaintiff, does not deny him the equal protection of the laws or deprive him of his property without due process of law, or otherwise impair any constitutional rights of the plaintiff set forth in the 14th Amendment to the U. S. Constitution or Sections 1 and 12, Declaration of Rights, Fla. Constitution.

3. The defendant is entitled to an injunction and the plaintiff be and he is hereby enjoined for a period of two years commencing February 15, 1965 (or commencing at such earlier date as plaintiff shall fully cease and desist from pursuit of the activities hereinafter enjoined), from:

(a) for himself, or in behalf of any other person or entity, engaging in the pest control business or any business engaged in the eradication and control of rats, mice, roaches, bugs, vermin, termites, beetles and other insects within the territory embraced within the cities of Tallahassee, Lake City, Apalachicola, Madison, Marianna, Port St. Joe, Carrabelle, Panacea, Wakulla, Live Oak, Jasper, Greenville, Monticello, Perry, Wewahitchka, Crawfordville, in the State of Florida and a 25 mile radius of each of said cities, and from directly or indirectly for himself or another or others soliciting or attempting to solicit the business of any person or other entity within said territory for the purpose of selling a service for the eradication and/or control of the aforesaid

pests and such other incidental business now engaged in by the defendant, and from disclosing to anyone any of the secrets, methods or systems used by defendant in and about its business; and from

(b) servicing contracts and accounts and/or work in the territory specified above for himself or any other or others directly or indirectly, or in conjunction with any other or others selling any kind of pest control service, or any service, items or products handled by the defendant.

4. The award of monetary damages to the defendant from the plaintiff, as sought in the defendant's counterclaim, is denied.

ORDERED, ADJUDGED and DECREED in Chambers this 11th day of January, A. D. 1965.

S/BEN C. WILLIS
CIRCUIT JUDGE

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IN THE

# Supreme Court of the United States

REUBEN CAPELOUTO,

Appellant,

-vs-

ORKIN EXTERMINATING COMPANY OF FLORIDA, INC., a Florida corporation,

Appellee.

No. 316

## MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE, ORKIN EXTERMINATING COMPANY OF FLORIDA, INC.

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IN THE

# Supreme Court of the United States

REUBEN CAPELOUTO,

Appellant,

-vs-

ORKIN EXTERMINATING COMPANY OF FLORIDA, INC., a Florida corporation,

Appellee.

**(On Appeal from the Supreme Court of Florida)**

---

## MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE, ORKIN EXTERMINATING COMPANY OF FLORIDA, INC.

---

Appellee, Orkin Exterminating Company of Florida, Inc., respectfully moves, pursuant to Rule 16 of this Court, to dismiss the appeal herein on the following grounds:

(1) The appeal is from a state court and does not present a substantial federal question.

(2) The judgment of the state court appealed from rests on an adequate non-federal basis.

In the alternative appellee moves the Court, pursuant to said Rule 16, to affirm the judgment of the state court on the following ground:

(1) It is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

## OPINION BELOW

The opinion and decision below are set forth in the Appendix to appellant's Jurisdictional Statement.

## STATUTE INVOLVED

The statute involved is Section 542.12 (2), Florida Statutes, 1963, and is set forth in appellant's Jurisdictional Statement at pages 4-5.

## PRELIMINARY STATEMENT

This appeal is from a decision of the Supreme Court of Florida holding valid Section 542.12 (2), Florida Statutes, 1963.

Section 542.12 (2) aforesaid specifically authorizes and declares valid contracts made by an agent or employee with

his employer to refrain from carrying on or engaging in a similar business and from soliciting old customers of the employer within a reasonably limited time and area so long as the employer continues to carry on a like business therein.

Appellant, Reuben Capelouto, hereinafter referred to as Capelouto, was employed by appellee, Orkin Exterminating Company of Florida, Inc., hereinafter referred to as Orkin, as a branch manager and prior to and during Capelouto's employment he entered into certain contracts with Orkin not to compete with Orkin for a period of two years immediately following termination of his employment in the area managed by Capelouto in the course of his employment. (Appellant's Jurisdictional Statement 1-2)

The Supreme Court of Florida held the statute to be valid and the contract to be reasonable and enforceable. Appellant, Capelouto, urges that a federal question is involved and contends that the statute offends the Fourteenth Amendment to the Federal Constitution.

Appellee contends that the statute is merely declaratory of the public policy of the State of Florida and that reasonable contracts contemplated by the statute have been upheld and sustained in numerous decisions of state and federal courts.

The Supreme Court of Florida has upheld the statute and contracts entered into pursuant thereto in several decisions.

## QUESTIONS PRESENTED

For the purpose of argument only we adopt the questions presented appellant, Capelouto, as follows:

(1) DOES SECTION 542.12(2), FLORIDA STATUTES, IN ITS APPLICATION TO APPELLANT, DEPRIVE HIM OF RIGHTS GUARANTEED UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

(2) WHEN AN EMPLOYEE AGREES, DURING THE TERM OF HIS EMPLOYMENT, WITH HIS EMPLOYER NOT TO COMPETE FOR TWO YEARS AFTER THE TERMINATION OF SUCH EMPLOYMENT, DOES THE ACTION OF A STATE COURT IN ENJOINING THE EMPLOYEE FROM COMPETING WITH HIS EMPLOYER FOR A TIME BEYOND THE TWO-YEAR PERIOD DEPRIVE THE EMPLOYEE OF RIGHTS GUARANTEED HIM UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

(3) WHEN AN EMPLOYEE AGREES, DURING THE TERM OF HIS EMPLOYMENT, WITH HIS EMPLOYER NOT TO COMPETE FOR TWO YEARS AFTER THE TERMINATION OF SUCH EMPLOYMENT, DOES THE ACTION OF A STATE COURT IN ENJOINING EMPLOYEE FROM COMPETING WITH HIS EMPLOYER

FOR A TIME BEYOND THE TWO-YEAR PERIOD IMPAIR THE OBLIGATION OF A CONTRACT, CONTRARY TO ARTICLE III, SECTION 10, OF THE UNITED STATES CONSTITUTION?

## ARGUMENT

1. Contracts in restraint of trade are permissible under state and federal law if the contract is reasonable both with respect to the public and to the parties.

Undoubtedly, the earlier doctrine of the law was that all contracts in restraint of trade were contrary to public policy, void and unenforceable, but this doctrine has been modified by the necessities of modern conditions and the present doctrine is that such contracts are valid and enforceable if reasonable in respect to the public and the parties. As early as the year 1911, this Court recognized this modification of the earlier doctrine in the case of *Dr. Miles Medicine Company v. John D. Park & Sons Co.*, 220 U. S. 373, 55 L. ed. 502, wherein this Court said:

> "With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are

void as against public policy. As was said by this court in Gibbs v. Consolidated Gas Co. 130 U. S. 409, 32 L. ed. 984, 9 Sup. Ct. Rep. 553: 'The decision in Mitchel v. Reynolds, 1 P. Wms. 181, s. c. 1 Smith, Lead. Cas. 7th Eng. ed. 407; 8th Am. ed. 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things and a state of society different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. Rousillon v. Rousillon, L.R. 14 Ch. Div. 351; Leather Cloth Co. v. Lorsont, L.R. 9 Eq. 345.'

"'The true view at the present time,' said Lord Macnaghten in Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. (1894) A.C. p. 565, 6 Eng. Rul. Cas. 413, 'I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification and indeed it is the only justification, if the restriction is reasonable,—reasonable, that is, in reference to the interests of the

parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public.'"

Literally hundreds of state and federal decisions are in accord with the doctrine of reasonableness set forth in Miles, supra.

Annotations in 41 ALR 2d 15-222, and 43 ALR 2d 94-321, cite cases from the federal courts and practically all state courts upholding contracts similar to the contract involved herein.

These cases upholding contracts similar to the one here involved are relevant because the basic fallacy of appellant's position, argument and complaint is that he has been deprived of his rights under the Fourteenth Amendment by the statute—but the fact is that appellant freely, voluntarily and as part of the consideration for his employment, contracted not to do certain things for a limited time in a limited area which otherwise he would have a perfect right to do.

The statute did not and does not deprive appellant of a single right guaranteed by the Fourteenth Amendment. The statute simply permitted him to do that which he did, to-wit: to enter into a reasonble contract to refrain from exercising certain rights that were his to exercise, or to contract not to exercise—and he elected to avail himself of the benefit of the very statute he now condemns as in-

valid and enter into a reasonable contract which he now repudiates and seeks the aid of the courts in justifying his repudiation.

The second question presented by appellant actually presents no federal question.

The appellant, Capelouto, appealed to a Florida court of equity for relief from his contract and after holding Section 542.12(2) constitutional and the contract entered into pursuant thereto reasonable and enforceable, the Chancellor took into consideration that immediately upon termination of his employment the appellant, in direct violation of his contract, commenced a competitive business of his own, advertised his service and over a period of months began servicing customers of appellee, Orkin, and upon consideration of these facts gave appellant approximately one month to arrange his affairs before the effective date of the injunction, and then by said injunction enjoined appellant, Capelouto, from further breach of the contract for a period of two years from the effective date of the injunction.

The Chancellor merely gave effect to the intent of the parties and required Capelouto to abide by the two years of non-competion which he had agreed to.

The Supreme Court of Florida recognized the equity inherent in the Chancellor's decree and affirmed it.

The appellant suffered no loss of rights under this provision of the decree except the rights he had lawfully contracted away.

In selecting decisions in support of appellee's position we are overwhelmed by available authorities.

The Supreme Court of Florida adheres to the rule announced by this Court in Miles, supra, and has pronounced the law of Florida in several cases to be that reasonable contracts in restraint of trade are not unlawful and that the statute authorizing such contracts is a valid enactment of the Florida Legislature.

In *Standard Newspapers v. Woods* (Fla. 1959), 110 So. 2d 397, the Court said:

> "We come, then, to the conclusion that the chancellor ruled correctly when he held the act constitutional."

Florida District Courts of Appeal have followed the decisions of the Supreme Court of Florida and in several cases have held contracts similar to the one here involved to be valid and enforceable.

In *Atlas Travel Service, Inc. v. Morelly* (DCA - 1, 1957) 98 So. 2d 816, a period of two years was found to be a reasonable time in a non-competing contract, and in the same case the Court found that the area specified in the contract coincided with the area of the employee's activity in behalf of the employer and held such area to be reasonable limitation for non-competition.

In the case of *The American Building Maintenance Co., of Oakland v. Fogelman* (DCA-3, 1964) 167 So. 2d 791, the Court held a three year period in a non-competing agreement to be reasonable and valid between employer and employee.

In the case of *Fogle, et al. v. Orkin Exterminating Company of South Florida, Inc.* (DCA-2, 1964) 168 So. 2d 153, the Court held the statute to be valid and upheld the reasonableness of a two year period and an area coinciding with the area of the employee's activity for the employer to be reasonable.

In the case of *Orkin Exterminating Company of South Florida, Inc., v. Lefkowitz* (DCA-3, 1964) 169 So. 2d 336, the Court upheld the statute and sustained as reasonable a period of two years after termination of employment and an area coinciding with the employee's activities for the employer as reasonable restrictions in the contract.

In this case we have a contract where the employee agreed not to engage in a competitive activity with the employer for a period of two years after termination of employment in an area coinciding with the area over which the employee had charge as a branch manager of the employer.

In this case two Florida courts, including the Supreme Court of the state, have held the statute to be constitutional and the contract reasonable and enforceable.

Factors considered by the Florida courts and which are relevant in consideration of the reasonableness of the contract, are:

(1) The business of the employer—pest extermination, involved materials, techniques and methods confidential in nature, which of necessity came to the knowledge of the employee.

(2) The territory embraced in the contract coincided generally with the area assigned to the employee as branch manager.

(3) The time agreed to for non-competitive activity, to-wit: two years, was reasonable to protect the employer from unfair competition.

This holding of the Florida courts is in full and strict accord with the rule announced by this Court in Miles, supra.

A search of other state cases shows that the holding of the Florida court was in full accord with the holding of practically all states in hundreds of decisions.

The following cases hold that a period of two years is a reasonable period in a non-competitive contract between employer and employee:

**Federal**

Masden v. Travelers Ins. Co., (1931, CA 8th, Mo.) 52 F. 2d 75.

Heinz v. National Bank (1916, CA 8th, Mo.) 237 F. 942.

**Connecticut**

Torrington Creamery v. Davenport (1940) 126 Conn. 515, 12 A 2d 780.

**Georgia**

Northeast Georgia Artificial Breeders Asso. v. Brown (1953) 209 Ga. 547, 74 SE 2d 660.

**Illinois**

Hoops Tea Co. v. Dorsey (1901) 99 Ill. App. 181.
Jules Chain Store Corp. v. Stone (1942) 316 Ill. App. 45, 43 NE 2d 849.

**Massachusetts**

Boston & S. Laundry Co. v. O'Reilly (1925) 253 Mass. 94, 148 NE 373.

### Ohio

Harry Livingston, Inc. v. Stern (1941) 69 Ohio App. 105, 43 NE 2d 302.

### New Jersey

A. Hollander & Son v. Imperial Fur Blending Corp. (1949) 2 NJ 235, 66 A 2d 319.

The above are but a few of the hundreds of cases cited and discussed in the annotation in 43 ALR 2d 94-321.

The following cases hold that territory limited to territory in which the employee engaged in business for his employer is reasonable:

### Federal

Cali v. National Linen Service Corporation (1930, CA 5th, La.) 38 F 2d 35.

### Illinois

Smithereen Co., v. Renfroe (1945) 325 Ill. App. 229, 59 NE 2d 545.

### Pennsylvania

Crosby v. McGlauflin (1945) 94 Pittsb Leg J 213.

**Maryland**

Deuerling v. City Baking Co., (1928) 155 Md. 280, 141 A 542.

**New Jersey**

Pilgrim Coat, Apron & Linen Service, Inc. v. Krzywulak (1948) 141 N.J. Eq. 212, 56 A 2d 584.

The above are but a few cases selected from the hundred of cases sustaining appellee's position in this issue.

The Florida courts took into consideration the fact that the appellant, Capelouto, came into possession of confidential information and that this is a material factor in determining reasonableness of the terms of the contract.

The following cases sustain the Florida courts on this point:

**Federal**

Knapp v. S. Jarvis Adams Co., (1905, CA 6th, Ohio) 135 F 1008.

Carter v. Alling (1890 CC Ill.) 43 F 208.

**Illinois**

Cahill v. Madison (1901) 94 Ill. App. 216.

**Missouri**

Haysler v. Butterfield (1949) 240 Mo App 733, 218 SW 2d 129.

**New Jersey**

Silbros, Inc. v. Solomon (1947) 139 NJ Eq 528, 52 A 2d 534.

**New York**

Holland Furnace Co. v. Beers (1941) 177 Misc 29, 29 NYS 2d 876.

**Texas**

Grace v. Orkin Exterminating Co. (1953, Tex Civ App) 255 SW 2d 279.

## CONCLUSIONS

(1) Section 542.12(2), Florida Statutes, 1963, authorizes reasonable contracts between employer and employee in restraint of trade, and it follows that if such reasonable contracts in restraint of trade are not invalid or violative of the Fourteenth Amendment to the Constitution of the United States, then the statute itself is not invalid.

(2) Reasonable contracts in restraint of trade under decisions of this Court, other federal courts, and innumerable state courts have been held valid and in accord with the federal and state constitutions.

(3) The appeal presents no federal question, the decision of the state court is correct, and the appeal should be dismissed or the judgment of the state court affirmed.

Respectfully submitted,

---

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Tallahassee, Florida

ATTORNEY FOR APPELLEE, ORKIN EXTERMINATING COMPANY OF FLORIDA, INC.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail, to Honorable Wilfred C. Varn of the law firm of Ervin, Pennington, Varn & Jacobs, P. O. Box 1567, Tallahassee, Florida, counsel of record for appellant,

this _____ day of July, 1966.

Attorney for Appellee
and a member of the bar of the
Supreme Court of the United States

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IN THE

# Supreme Court of the United States

REUBEN CAPELOUTO,

Appellant,

vs.

No. 316

ORKIN EXTERMINATING COMPANY OF FLORIDA, INC., a Florida corporation,

Appellee.

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## BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR TO AFFIRM

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IN THE

# Supreme Court of the United States

REUBEN CAPELOUTO,

Appellant,

vs.

ORKIN EXTERMINATING COMPANY OF FLORIDA, INC., a Florida corporation,

Appellee.

**(On Appeal from the Supreme Court of Florida)**

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## BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR TO AFFIRM

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This appeal is taken pursuant to 28 U.S.C. 1257(2) which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *

> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitutions, treaties or laws of the United States, and the decision is in favor of its validity."

The appellee does not deny obligatory jurisdiction in this Court of this appeal under that statute; but it argues that the questions involved in this appeal lack substantiality.

The import of this case lies in its restriction upon the right of an individual to follow a lawful calling and thereby to earn a living for himself and his family.

Every person has the right to engage in any lawful occupation, trade, or calling, and such right is "property" and "liberty" of which one may not be deprived without due process of law. The right to engage in a useful and legitimate business may be regulated but not prohibited. See 16A C.J.S. 1069.

This Court, in **Coppage v. Kansas,** 236 U.S. 1, at page 14, stated:

> "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of per-

> sonal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."

And in 16 C.J.S., at page 1081, is stated:

> "Everyone has the right to work and earn a living, and the pursuit of any legitimate trade, occupation, business, or profession is recognized under our form of government. Such a right is fundamental, natural, essential, and inalienable right, one of the privileges of citizenship and is fully protected by fundamental laws."

Appellee—an employer, an affiliate of a nationwide pest-control concern, with thousands of employees—seeks by the use of a mandatory contract with its employees, to eliminate competition in killing bugs. The danger in such contracts lies in the control given to an employer over his employees, not only during employment but also for long periods of time subsequent to the termination of the employment. And here, as always, the employer seeks to justify the restraint by saying, "He didn't have to sign the contract." This is a completely unrealistic attitude; is there any individual who would refuse to sign such a contract during his term of employment, especially if it be a condition for continued employment? Does an

employee normally have any idea of competing with his employer in the future? Certainly not. The insidious nature of this contract and of any law allowing it is readily apparent.

Such a contract was void at common law as being against public policy. It was against public policy because it forbade one from engaging in a lawful occupation, and would result in destitution. Thus, the common law simply stated the fundamental law, the natural right to earn a living. This right is protected in the United States by our Constitution; and when the state permits that right to be fettered in any way, its action is invalid.

The employer-employee contract not to compete is one of three types of contracts in restraint of trade which only since 1953 have been permitted under the Florida statute. It is the validity of that statute relating to the employer-employee contract which is attacked and which was attacked below. The "validity" of a state statute is sustained, for purpose of an appeal under 28 U.S.C. 1257(2), when the state court holds the statute to be consistent with the Federal Constitution; **La Crosse Tel. Corp. v. Wisconsin Employment Relations Board,** 336 U.S. 18. This the Florida court did.

For the sake of this argument, however, let us assume that the subject contract does not impinge upon

the right of appellant to earn a living. The contract specified that within the stated territory the appellant could not compete, directly or indirectly, with his employer for two years after the termination of employment. The contract was terminated effective May 1, 1964. Under no circumstance was the covenant not to compete operative after May 1, 1966. The lower court, however, arbitrarily extended the term of the contract for an additional period of more than nine months, until February 1, 1967. It is interesting to note the dissent below on this point, in which three justices of the Supreme Court of Florida (out of seven) agreed that this was error, saying (Jurisdictional Statement, App. 8):

> "Capelouto terminated his employment on May 1, 1964, and it is my view the injunction should have been made effective for a period ending two years thereafter."

To extend the duration of the contract without the agreement of both parties to the contract is completely beyond the power of the court; its action, as an arm of the State of Florida, was therefore arbitrary and unreasonable as applied to this appellant and violates the Fourteenth Amendment. As stated in 43 C.J.S. 575, in discussing covenants not to compete in contracts of employment:

> "Where protection is restricted by the agreement to a designated time, the agreement binds the parties as to the time stipulated and after the expiration of the period the prohibition ceases to exist, and injunctive relief will not be afforded for a time beyond that for which the parties contracted."

The appellant filed his suit below promptly; but the lower court failed to rule until five months after the final hearing had elapsed. The appellant must not be charged with delay engendered by the court.

Appellee claims that the **Miles** decision (**Dr. Miles Medicine Company** v. **John D. Park & Sons Co.**, 220 U. S. 373) has settled the issues raised here. That case, however, involved the validity of an agreement between a manufacturer, wholesaler and retailers creating a combination to maintain prices and stifle competition. This Court condemned the contract there found to be in restraint of trade.

We do not disagree with the general principles of law there set forth; but those principles cannot be used to justify the type of contract with which we are here involved; neither can they justify the action of the state court in extending the life of the contract not to compete, thereby adding further restraint to appellant's right to earn a living.

Although appellee claims "hundreds" of state and federal decisions in accord, none are cited; and the annotations in 41 and 43 A.L.R. 2d do not go to the validity under the United States Constitution of state statutes authorizing contracts between employer and employee by which the latter may not compete with the former.

The appellee, at page 3 of its motion, makes the statement:

> "The Supreme Court of Florida held the statute to be valid and the contract to be reasonable and enforceable. Appellant, Capelouto, urges that a federal question is involved and contends that the statute offends the Fourteenth Amendment to the Federal Constitution."

While it states that the "Supreme Court of Florida has upheld the statute and contracts entered into pursuant thereto in several decisions", the only decision cited is **Standard Newspapers** v. **Woods**, 110 So. 2d 397; but, as the lower court in this case held (see Jurisdictional Statement, App.20):

> "Moving then to a consideration of the constitutionality of subsection (2) in the light of the construction of its terms as authorizing a non-competitive contract to extend beyond termination of employment relationships, it is found that our appellate courts have not directly and expressly passed on this question."

The Supreme Court of Florida itself recognized this, by stating (Jurisdictional Statement, App. 4):

> "Therefore, as the chancellor recognized in the decree under review, the **Standard Newspapers** case did not specifically settle the constitutionality of subsection (2), Section 542.12, as applied to contracts affecting employees or agents."

The decisions of the Florida District Courts of Appeal cited by appellee were erroneously premised upon the **Standard Newspaper** case, which had only held the basic statute to be constitutional. The appellee, therefore, is incorrect in its statement in this regard.

While appellant is "overwhelmed by available authorities", we are not so. The cases cited do not go to the question of constitutionality, but only to reasonableness of time and area. After all, even under the Florida statute, the time and area must be reasonable.

A careful review of the cases cited show that two years has been generally found by the Florida courts to be reasonable; and those circumstances in which two years would be unreasonable are nonexistent. As to area, any area coextensive with the area in which the employee worked is deemed reasonable by the Florida courts.

What appellee is really trying to say is: An employee has freedom to contract and freedom to earn

a living, but by the exercise of the first he may limit the second. We do not believe this to be the law of these times. To agree with appellee is to open the door to monopoly and restraint of trade of the rankest sort. Public policy, as expressed by Federal anti-trust laws, generally opposes such restraint. To allow such contracts is to allow employers to say to their employees—secretaries, service personnel, maintenance men, with no exception: "You may work for me if you sign a contract not to compete." Which means, "If you work for me in Florida, you cannot work for my competitor in Florida for as long as two years after you leave my employ, whether you quit or I discharge you!"

The substantial nature of the questions raised by this appeal is beyond cavil.

Appellant requests that the matter be considered on its merits by this Court.

Respectfully submitted,

WILFRED C. VARN
of the law firm of
Ervin, Pennington, Varn & Jacobs
Post Office Box 1567
Tallahassee, Florida

Attorneys for Appellant

I HEREBY CERTIFY that a copy hereof has been furnished by mail to Honorable J. Lewis Hall, of Hall, Hartwell, Hall & Canada, counsel of record for appellee, at the office of said counsel, Midyette-Moor Building, Tallahassee, Florida, this ..... day of ....., 1966.

.....

Attorney for Appellant
and a member of the bar of the
Supreme Court of the United States

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Appellee.

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## PETITION FOR REHEARING

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Attorneys for Appellant

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IN THE

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:

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## PETITION FOR REHEARING

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This Court, by its order of October 10, 1966, dismissed the appeal in the above-styled cause for the stated reason that no substantial federal question was involved.

Appellant petitions for rehearing of this appeal pursuant to Rule 58 of this Court.

This Court has been severely criticized, most particularly in the general area from which this appeal comes, for its concern for the individual rights guaranteed to every citizen by the United States Constitution. To now state that there is no substantial federal question involved in a case where one of the most sacred and fundamental of individual rights is involved, the right to earn a living in a lawful business or profession, is totally out of keeping with the previous decisions of this Court. It must be respectfully submitted that it is also out of keeping with the decisions of the Florida Supreme Court on this same philosophical question. The Supreme Court of Florida, more than 20 years ago, in the case of **State v. State Board of Administration,** 25 So. 2d 880, stated the rule in the following language:

> "The major question is one that concerns the general welfare, and, when that is the case, constitutional questions should be approached from the pragmatic rather than the legalistic point of view. Courts can do this and not transgress the bounds of constitutional framework. The Constitution is what the people intended it to be; its dominant note is the general welfare; it was not intended to bind like a strait-jacket but contemplated experimentation for the common good. When it was promulgated, its sponsors thought it the embodiment of the common concept of right and a practical means of insuring justice. Interpreted with these precepts to guide us, we arrive at correct judgments that can be enforced with

the minimum of coercion. Not only that, we dispel the charge that the Constitutional interpretation is an expression of judicial prejudices or of the judges' social and economic theories. The question here involves new complexes that must be thought through in the light of the purpose designed to be accomplished and not in the light of outworn dogmas that do nothing more than throw our means of administering justice into a stalemate."

The statute upheld by the court below (Section 542.12, Florida Statutes) condemns contracts under which persons are restrained from pursuing a lawful profession, trade or business, with two paragraphs of exceptions. One relates to partners and is not involved here, and the other excludes from the statutory prohibition three categories of contracts: (1) those who sell the good will of a business; (2) shareholders who sell all their stock in corporations; (3) employees or agents. The Florida Supreme Court, in its decision in **Capelouto v. Orkin Exterminating Company of Florida,** 183 So. 2d 532, admitted that the application of the statute to employees had not been, prior to this litigation, passed by that court. The Florida court's previous decision of **Standard Newspapers v. Woods,** 110 So. 2d 397, merely upheld the validity of the statute as it related to the sale of the stock of a corporation. The court then, in two paragraphs taking less than one-fourth of a page in the reported volume, extended the previous decisions to include the appellant in the following language:

"[1] As was pointed out in our opinion in Standard Newspapers, supra, under the common law, contracts restricting a man's right to follow his calling were considered void. But the reasons which supported the common law view have long since disappeared. In any event, there can be no doubt that the legislature of our state has the power to enact legislation superseding the common law as it did by enactment of Section 542.12, and more specifically by the enactment of subsections (2) and (3) thereof.

"[2,3] Appellant argues that the statute is invalid as denying him equal protection and due process of law, but he offers no convincing authority in support. There has been no showing of invalidity sufficient to overcome the presumption of validity which we must indulge in favor of every properly enacted statute. Kass v. Lewin, Fla. 1958, 104 So. 2d 572. We therefore hold subsection (2) of Section 542.12 as applied to such contracts between an employee and an employer to be constitutional."

It is respectfully submitted that the statute's application to the appellant can be clearly distinguished from its application to the sale of a business or stock. When one sells the good will of a business or when shareholders sell all of their stock in corporations, the contract is entered into and is immediately effective. The parties engage in an arms-length transaction and are intimately familiar with the effect that it will have upon their future conduct. Examine, if

you will, the differences between this and the effect that the statute has on employees such as the appellant. A contract was first entered into between the appellant and the appellee on August 1, 1949 (Jurisdictional Statement, page 6) and the contract of employment was terminated on May 1, 1964. How could any employee in 1949 anticipate the effect which his contract would have upon his ability to earn a livelihood in 1964? To equate this situation to one where parties enter into a contract to sell a business or its stock or its good will, which contract is effective immediately, is totally unreasonable. Examine the effect of the rule of the court below on the appellant and all others similarly situated. As a condition of employment, the employer may require him to enter into a contract in perpetuity which will prohibit him from engaging in competition with the employer for a reasonable time (here, two years) and in a reasonable area (here, 15 or 16 counties in North and Northwest Florida). Sixteen years from now, if the employee, regardless of reasons desires to sever his relationship with the employer, he is required to do one of two things. One, either remove his family from his residence of 16 years, disrupting his childrens' education; or, two, engage in some new business in which he has no training or experience. To state the rule as it affects the appellant is to show the substantial federal question involved.

At the date that decree was entered (on January 11, 1965), Orkin was engaged in structural pest control, as distinguished from lawn and ornamental pest

control. Structural pest control is, as its very name implies, related to the control of pests in buildings; lawn and ornamental pest control relates to the control of tree, grass and shrubbery pests.

The record confirms that the subject matter of the contract in dispute related to employment in the structural pest control field and to an agreement on the part of appellant not to compete in structural pest control.

The injunction follows the wording of the contract and restrains appellant from competing with appellee "in the pest control business or any business engaged in the eradication and control of" pests (Jurisdictional Statement, App. 27) and from "servicing contracts . . . himself or in conjunction with any other . . . selling **any kind of pest control service.**" (Id., App. 28; emphasis supplied). As noted, this effectively and implicitly prevents appellant from engaging in lawn and ornamental pest control even though appellee, his employer, did not hold itself out as being in that type of activity in the area convered by the contract.

The law of Florida on the date of the injunctive decree was entitled "Structural Pest Control Act" (Chapter 482, Florida Statutes). There was no attempt to license or regulate lawn or ornamental pest control operators. The 1965 Florida Legislature, however, subsequent to the entry of the decree, amended that act so as to embrace lawn and ornamental pest control, as well as structural pest control. Consequent-

ly, the contract and the final decree are susceptible of being construed as restraining appellant from engaging in lawn and ornamental pest control, although such was not contemplated by the parties as being within the covenant not to compete.

The question here is one of an individual right—the right to earn a lawful living for oneself and his family. The charge is that the contract, its construction (both actual and that to which it is susceptible) and the application of the statute and the decree of the state court to this appellant infringe upon the constitutional guaranty. In the language of the Florida Supreme Court, this constitutional question should be approached from the pragmatic rather than the legalistic view. The right to earn a living in a business or profession of the individual's choosing is basic to the preservation of the other rights so jealously guarded by this Court; i.e., the right to vote, to counsel, to freedom from unreasonable search and seizure. Without the unfettered right to earn a livelihood, the others have no meaning.

The two reasons given by the Florida court for upholding the statute, (1) the reasons for the common law rule voiding contracts restricting a man's right to follow his chosen profession having long since disappeared, and (2) there was no convincing authority and no showing of invalidity sufficient to overcome the presumption of validity which is indulged in favor of every properly enacted statute, sound hollow indeed when the right taken away is as basic and fundamental as herein involved.

Respectfully submitted,

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of the law firm of
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Attorneys for Appellant

## CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that the foregoing Petition for Rehearing is filed in good faith and not for delay.

WILFRED C. VARN
Attorney for Appellant
and a Member of the Bar
of the Supreme Court of
the United States.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail to Honorable J. Lewis Hall, of Hall, Hartwell, Hall & Canada, counsel of record for appellee, at the office of said counsel, Midyette-Moor Building, Tallahassee, Florida, this _____ day of November, 1966.

Attorney for Appellant
and a Member of the Bar
of the Supreme Court of
the United States.

END